

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**
Date: **2 December 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public with Public Annex A

**Second Public Redacted Version of “Defence Response to Prosecution’s second
Request pursuant to Rule 68(2)(b)”, filed on 5 October 2016**

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to "Prosecution's second request for introduction of prior recorded testimony pursuant to rule 28(2)(b) of the Rules" ('Application').¹
2. The Defence respectfully asks Trial Chamber IX ('Chamber') to dismiss the Application on the grounds that:
 - a. It violates Article 74 of the Rome Statute;
 - b. It violates Articles 51(4) and 67(1)(e) of the Rome Statute as being applied retroactively to the detriment of a person was being investigated; and
 - c. It violates Articles 64(2), 67(1)(b) and 67(2) of the Rome Statute and Rules 76(3) and 77 of the Rules of Procedure and Evidence ('RPE').
3. In the alternative, should the Chamber decide that Rule 68(2)(b) of the RPE is applicable to this case, the Defence asserts that the Chamber should adopt a cautious approach and evaluate each proposed witness on a case-by-case basis.

II. CONFIDENTIALITY

4. The Defence files this submission confidential pursuant to Regulation 23*bis*(2). A public redacted version will be filed on 6 October 2016. Annex A is public.

III. SUBMISSIONS

5. At the outset, the Defence notes its previous concerns that the Prosecution places too much emphasis on expedience over fairness. The Defence voiced its concerns with the Prosecution's apparent haste to submit Rule 68 applications

¹ ICC-02/04-01/15-538-Conf.

during the 23 May 2016 status conference,² to which the Prosecution declined to answer the Defence's concerns.³ The Defence reiterates this issue due partially in fact to the Prosecution's request to submit P-0274's second statement, which was taken on 15 and 16 July 2016.⁴

6. The concern of the Defence is that these applications are being made with disregard for the fairness of the proceedings. Everything appears to be about expedience. Had the Prosecution held off until its investigations were completed, this situation, and the fact that the Defence is responding to a second Rule 68 request, would be moot.

A) The Prosecution Application violates Article 74 of the Rome Statute

7. The Defence incorporates by reference paragraphs 9-13 of the Defence submission ICC-02/04-01/15-509-Conf-Corr.
8. Whilst paragraph 13 of submission 509 deals with the Prosecution waiting until after its final disclosure date to file Rule 68 applications, relying on this is not dispositive in light of the Single Judge's ruling on 7 June 2016 in relation to Rule 76(3) of the RPE,⁵ which is discussed below in Section III(C).

B) The Prosecution Application violates Article 51(4) and 67(1)(e) of the Rome Statute

9. The Defence incorporates by reference paragraphs 15-40 of the Defence submission ICC-02/04-01/15-509-Conf-Corr.

² ICC-02/04-01/15-T-25-ENG, pgs 38:25-39:7.

³ ICC-02/04-01/15-T-25-ENG, pg. 39:9-12.

⁴ UGA-OTP-0267-0174-R01, at 0174.

⁵ ICC-02/04-01/15-457, para. 10.

C) The Prosecution Application violates Article 64(2), 67(1)(b), and 67(2) of the Rome Statute and Rules 76(3) and 77 of the RPE

10. The Defence incorporates by reference paragraphs 42-49 of the Defence submission ICC-02/04-01/15-509-Conf-Corr.
11. Identical to the Defence's previous argument pertaining to Rule 76(3) of the RPE,⁶ the Prosecution has failed to adhere to the Single Judge's 7 June 2016 ruling on Acholi translations of witness statements.⁷ Attached as Public Annex A is a list of witness statements which the Prosecution seeks to introduce, and the dates which the translations were disclose to the Defence.
12. As is evidenced by Annex A, none of the witnesses meet the Single Judge's 7 June 2016 ruling. Only one witnesses statement, the first statement of P-0029, has been in the Defence's possession, and hence Mr Ongwen's, for more than three (3) months.
13. Again, as in ICC-02/04-01/15-509-Conf-Corr, the Defence strenuously objects to the admission of any witnesses in which Mr Ongwen has not been given adequate time to review and consult with the Defence.

D) In the Alternative, the Chamber should Evaluate the Witnesses on a Case-by-Case Basis

14. The Defence reiterates its submissions from ICC-02/04-01/15-509-Conf-Corr in that the Chamber should consider the following standards if assessing the witnesses on a case-by-case basis:
 - a. The issues are not materially in dispute;⁸

⁶ ICC-02/04-01/15-509-Conf-Corr, paras 48-49.

⁷ ICC-02/04-01/15-457, para. 10.

⁸ ICC-02/04-01/15-509-Conf-Corr, paras 5-8.

- b. The proposed testimony is of cumulative or corroborative nature;⁹
- c. The information relates to background information only;¹⁰
- d. The admission is in the interest of justice;¹¹ and
- e. The proposed testimony has sufficient indicia of reliability.¹²

i) **P-0029, P-0337 and P-0404**

15. The Defence reiterates its comments from ICC-02/04-01/15-509-Conf-Corr, paragraphs 71-103 on the introduction into evidence any and all persons related to the collection and storage of the alleged intercept information.
16. The Defence places special emphasis on its submissions in paragraphs 97-103 of ICC-02/04-01/15-509-Conf-Corr. Because of the highly unorthodox actions of P-0003, which includes serious issues dealing with his veracity, credibility and character, all proposed witnesses who were in regular contact with P-0003 should be questioned by the Defence on P-0003's activities and character. Witness P-0404 worked directly with P-0003.¹³ Witness P-0337 explained how the records were stored, and it is during such storage that P-0003 has been accused to tampering with the records.¹⁴
17. Witness P-0337 "was the commanding officer of the UPDF direction-finding and LRA radio communication interception team in Gulu, and the administrative head of the UPDF radio interception and direction-finding operations in Uganda and Sudan."¹⁵ As the CO, failure to allow the Defence to examine this witness would seriously prejudice the Defence and cause a

⁹ ICC-02/04-01/15-Conf-Corr, paras 55-57.

¹⁰ ICC-02/04-01/15-Conf-Corr, paras 58-59.

¹¹ ICC-02/04-01/15-Conf-Corr, paras 60-62.

¹² ICC-02/04-01/15-Conf-Corr, paras 63-64.

¹³ ICC-02/04-01/15-538-Conf, para. 34 (citing UGA-OTP-0267-0470, at 0474-76).

¹⁴ *For example see* UGA-OTP-0242-0219, at 0220.

¹⁵ ICC-02/04-01/15-538-Conf, para. 32 (citing UGA-OTP-0267-0445, at 0447).

genuine miscarriage of justice. Explaining the processes in which the UPDF “located” alleged persons communicating on radios is an important aspect of the Prosecution’s and Defence’s cases. The Defence intends to challenge the processes in which the UPDF “located” persons on the radio, and explain the deficiencies in the UPDF techniques. Similarly, P-0029 discusses the direction-finding operation of the UPDF. Failure to bring the CO of this operation, and persons acting within it, would be contrary to the interest justice and are issues which are materially in dispute.

18. Finally, as noted by the Prosecution, P-0029 outlines the interactions that the ICC had with the UPDF.¹⁶ The chain-of-custody of many of these materials, including the history behind the material,¹⁷ is in dispute. As above, failure to allow the Defence to question this witness on the historical background of the UPDF interception operation would be a miscarriage of justice and disallow the Defence to question witnesses on disputed materials.

ii) **P-0274**

19. The Defence incorporates by reference paragraphs 178-180 of ICC-02/04-01/15-509-Conf-Corr. As a camp leader, failure to allow the Defence to examine this witness would be a serious miscarriage of justice.

iii) **P-0281**

20. Expense reports disclosed to the Defence show that the Prosecution met with P-0281 on or around [REDACTED] June 2016.¹⁸ No records linked to this meeting and the witness, other than the expenses, have been disclosed to the events.

¹⁶ ICC-02/04-01/15-538-Conf, para. 31.

¹⁷ ICC-02/04-01/15-538-Conf, para. 30.

¹⁸ See UGA-OTP-0268-0309.

21. Until such time that these answers are explained, it would be a serious miscarriage of justice to admit this statement. The Defence cannot properly assess as to whether this witness's statement agrees with, or contradicts, statements made by other witnesses or in fact, her disclosed statement. With these lingering questions, it is impossible to determine whether P-0281's statement is actually cumulative or corroborative in nature.

iv) **P-0256**

22. It is in the interests of justice to have witness P-0256 testify. Though the Defence may not need to ask many questions, the fact remains that the enhanced radio intercepts are an important element of the Prosecution's case. For this reason, any conviction based upon this material should have the processing of the material carefully scrutinised by the Defence.

23. As noted in a prior Defence Rule 68 Response,¹⁹ and subsequently further confirmed by the Prosecution Pre-Trial Brief, the radio intercepts are at the core of the Prosecution case. Among other ways, they are used to establish the existence of a non-international armed conflict²⁰ and Mr Ongwen's knowledge of this conflict.²¹ They are used to establish Dominic's knowledge of the organisational policy of an attack on a civilian population²² and the hierarchical structure of the LRA.²³ They are used in relation to Mr Ongwen's command-role and by extension command-responsibility.²⁴ They are used to establish persecutory intent²⁵ and *inter alia* Mr Ongwen's mental states, connection to crimes, and essential contributions for certain crimes through his claims of

¹⁹ See for example ICC-02/04-01/15-509-Conf-Corr-Red, para. 79.

²⁰ ICC-02/04-01/15-533, para. 30.

²¹ ICC-02/04-01/15-533, para. 30.

²² ICC-02/04-01/15-533, para. 42 and 52.

²³ ICC-02/04-01/15-533, para. 92, 109, 110, 113, 114, 119, 122 and 135.

²⁴ ICC-02/04-01/15-533, para. 95 and 96.

²⁵ ICC-02/04-01/15-533, para. 160, 164, 175, 176 and 203.

responsibility, including: for Pajule,²⁶ Odek,²⁷ Lukodi²⁸ and Abok;²⁹ sexual and gender based crimes;³⁰ and the use of child-soldiers.³¹

24. The Prosecution seeks to have witness P-0242's statement – another enhancement expert – tendered through Rule 68(2)(b). In such case, it will not be the case that “other witnesses will give or have given oral testimony of similar facts” pursuant to the factor in Rule 68(2)(b)(i). While each witness processed different batches of audio, and for this reason both should testify, if neither do, then an important step in the processing of this “voluminous”³² body of material will go un-examined.
25. Moreover, the interests of justice do not militate against P-0256 testifying because this witness is not a victim of any charged crime and is present at the seat of the court thus there is no hardship that would be visited upon P-0256 by requiring a short oral appearance. P-0256 can be called upon to testify on short order. Where gaps in the trial schedule appear, P-0256's appearance can be secured and examined.

IV. RELIEF

26. The Defence respectfully requests the Chamber to dismiss the Prosecution Application pursuant to the reasons outlined in paragraphs 2 and 7-13 above.
27. In the alternative, the Defence requests the Chamber to take into advisement the reasons outlined in paragraphs 14-25 above and require the live testimony of the aforementioned six (6) witnesses.

²⁶ ICC-02/04-01/15-533, para. 215, 254, 293 and 362.

²⁷ ICC-02/04-01/15-533, para. 321, 342, and 348.

²⁸ ICC-02/04-01/15-533, para. 407, 416, and 426.

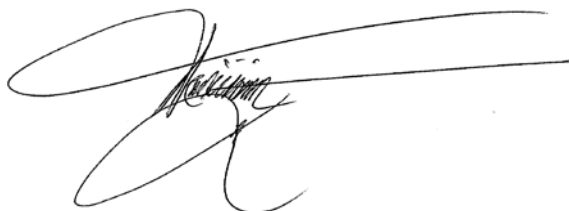
²⁹ ICC-02/04-01/15-533, para. 435, 438, 445, 474 and 480-486.

³⁰ ICC-02/04-01/15-533, para. 653-655 and 657.

³¹ ICC-02/04-01/15-533, para. 705, 710, 712, 743 and 746.

³² ICC-02/04-01/15-533, para. 62.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by a horizontal line and a small flourish.

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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 2nd day of December, 2016

At Kampala, Uganda